ANG BENG HOE

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
TUAN T. SELVENTHIRANATHAN JC
[CRIMINAL APPEAL 41-121-94]
30 AUGUST 1994

CRIMINAL PROCEDURE: *Section 296 Criminal Procedure Code - Appeal against conviction and sentence - Failure to report whilst under police supervision - Prescribed time for reporting not given by chief police officer - Whether offence committed - Whether charge proper.*

The appellant pleaded guilty to a charge under s. 296(ii) of the Criminal Procedure Code (CPC), punishable under s. 297(c), for failure to report himself once a month, whilst under police probation. He was convicted and sentenced to a maximum term of one year's imprisonment. Whilst serving his sentence, his solicitors filed a notice of appeal against the sentence imposed on the grounds, *inter alia*, that the Magistrate had erred in fact and law when he failed to give due consideration to appellant's plea of guilty.

The Court in holding that the question of maximum sentence imposed under the law was not merited, proceeded to decide on the issue as to whether the appellant was properly charged in the first place.

Held:

[1] Before a person who is a police supervisee can be charged with failing to comply with the requisitions of s. 296(ii) of the CPC, the chief police officer concerned must himself first prescribe the time at which the police supervisee must report to himself or to such other person as he directs. Where the chief police officer does not so prescribe the time, the police supervisee cannot be said to have failed to act in conformity with the law applicable as the condition precedent for the imposition of the duty on the police supervisee would not have been satisfied for the duty to arise.

[2] There was no prescription by the chief police officer of Penang at all for the appellant to report himself to the chief police officer at the prescribed time. Neither was there any prescription by the chief police officer for the appellant to report to the officer in charge of the Butterworth police district on such day and such time in each month as specified.

[3] There was, in these circumstances, no proof of the commission of the offence charged and the learned Magistrate should have rejected the plea of guilty by the appellant and proceeded to try the case pursuant to s. 173(c) of the CPC as one where the appellant claimed to be tried.

[4] The conviction of the appellant on the charge was not in accordance with law. His incarceration therefore cannot be sustained.

[Appellant's plea of guilty set aside; conviction and sentence imposed quashed; no order as to retrial].

Case referred to:
Swander Singh a/l Bawa Singh v. Public Prosecutor **(refd)**

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35
Criminal Procedure Code, ss. 173(c), 294, 295, 295(i)(b), 296, 296(ii), 297, 297(c)
Dangerous Drugs Act 1952, ss. 12(2), 12(3)
Federal Constitution, Article 5(1)

For the appellant - Subbaiyah; M/s. Subbaiyah & Co.
For the respondent - Ahmad Fairuz bin Dato' Zainol Abidin, DPP; Attorney-General's Chambers

JUDGMENT

T. Selventhiranathan JC:

The appellant was charged in the Magistrate's Court at Butterworth that he, on 4 June 1990, being a person under police supervision for a period of twelve months from 4 September 1989 to 3 September 1990, did fail to report himself once a month to the officer in charge of the Butterworth police district, where he was resident, as specified by the chief police officer Penang and that he thereby committed an offence under s. 296(ii) of the Criminal Procedure Code ("the CPC") and punishable under s. 297(c) thereof.

The appellant pleaded guilty to the charge on 4 April 1994 whereupon the facts of the case were adduced, and he was found guilty and convicted on the charge and sentenced to the maximum term of one year's imprisonment imposable. An application for a stay of the sentence pending his appeal to the High Court was rejected on 13 April 1994. He has therefore been serving the sentence imposed.

However, on 4 April 1994 itself, his solicitors filed a notice of appeal on his behalf against the sentence imposed. The petition of appeal dated 12 May 1994 contained five grounds of appeal as follows:

(a) the learned Magistrate erred in fact and in law in failing to give due consideration to the appellant's plea of guilty;

(b) the learned Magistrate erred in law when he imposed the maximum sentence for the offence when the appellant had pleaded guilty thereto;

(c) the learned Magistrate erred from the aspect of applicable legal practice when he did not take into consideration the plea of guilty of the appellant when he imposed the maximum sentence;

(d) the learned Magistrate erred in fact when he did not give due consideration to the plea in mitigation when he imposed the maximum sentence;

(e) the learned Magistrate erred in fact when he took into consideration facts which were not relevant when imposing sentence.

The facts adduced (Exhibit P1) before the learned Magistrate revealed that on 7 July 1990 at about 8.30 a.m. the complainant, police constable Sharudin bin Ismail, carried out an examination of the files of police supervisees who were required to report monthly at the Butterworth police station and found that the appellant had failed to so report since 4 May 1990, whereupon the complainant made a police report *vide* Butterworth report 3859/90. The appellant was subsequently arrested in Butterworth on 21 December 1993 at about 10.00 p.m.

In addition to the facts adduced, the notes of proceedings recorded by the learned Magistrate showed that a document, which purported to be a police supervision order, was submitted as Exhibit P2, bore the heading:

"PEJABAT REKOD JENAYAH

KUALA LUMPUR"

and contained the appellant's particulars and criminal record. It had an annotation that on 9 February 1987 at about 4.30 p.m. in an empty house at Jalan Raja Uda, Butterworth, Penang, the appellant was "found in possession of dangerous drugs, to wit, traces of heroin, and thereby committed an offence under s. 12(2) and punishable under s. 12(3) of the Dangerous Drugs Act 1952". It also had an annotation that on 17 April 1987 the appellant was "bound over in the sum of RM2,000 in one surety for a period of two years under s. 294 of the Criminal Procedure Code (surety found - bond executed)" for this offence.

Exhibit P2 further showed that on 4 March 1989 the appellant was arrested under s. 12(3) of the Dangerous Drugs Act 1952 and that he was on 14 July 1989 sentenced to nine months' imprisonment for this offence with effect from 4 March 1989, followed by one year's police supervision.

The two previous convictions of the appellant adverted to above were submitted as Exhibit P3. The latter also confirmed that the appellant was directed to be subject to the supervision of the police for a period of one year. This direction would have been made under s. 295(i)(b) of the CPC which allows for the imposition of such a direction for a period of not more than one year

commencing immediately after the expiration of the sentence of nine months' imprisonment passed on the appellant on 14 July 1989 by the Magistrate's Court at Butterworth.

Section 296(ii) of the CPC provides as follows:

> (ii) Every person subject to the supervision of the police, if a male, shall once in each month report himself at such time as is prescribed by the chief police officer of the state in which he resides either to such chief police officer himself or to such other person as that officer directs, and such chief police officer or other person may upon each occasion of such report being made take or cause to be taken the fingerprints of the person so reporting.

In arguing this appeal, Encik Subbaiyah for the appellant urged this Court to reduce the maximum sentence of one year's imprisonment imposed on the appellant for the reasons set out in the petition of appeal. The main plank of his submission was that the maximum sentence should not have been imposed having regard to the fact that the appellant had pleaded guilty to the charge which showed remorse on his part. It also saved the time of the Court and expenses which would have been incurred had the case proceeded to trial. The learned Deputy Public Prosecutor argued otherwise on behalf of the respondent, contending that this was a proper case for the imposition of the maximum sentence.

Having regard to the circumstances of this case, I was of the view that the maximum sentence imposable under the law was not merited here. However, what was of greater concern to the Court was a more basic and fundamental issue which had not been canvassed by the parties.

Section 296(ii) of the CPC stipulates that every male person subject to the supervision of the police shall once in each month report himself "**at such time as is prescribed by the chief police officer of the State in which he resides either to such chief police officer himself or to such other person as that officer directs**" (Emphasis added).

Section 297 of the CPC then provides as follows:

> 297. If any person subject to the supervision of the police who is at large within the Federation:
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> (a) remains in any place for forty-eight hours without notifying the place of his residence to the officer in charge of the police district in which such place is situated;
>
> (b) fails to comply with the requisitions of the last preceding section on the occasion of any change of residence;
>
> (c) fails to comply with the requisitions of the last preceding section as to reporting himself once in each month,

he shall in every such case unless he proves to the satisfaction of the Court before which he is tried that he did his best to act in conformity with the law be liable to imprisonment for one year.

The appellant was charged with contravening s. 296(ii) of the CPC, which was punishable under s. 297(c).

It is clear from a reading of the provisions of ss. 295, 296 and 297 the CPC referred to above that before a person who is a police supervisee can be charged with failing to comply with the requisitions of s. 296(ii) of the CPC requiring him once in each month to report himself to the chief police officer of the State in which he resides or to such other person as the chief police officer directs, the chief police officer concerned must himself first prescribe the time at which the police supervisee must report to himself or to such other person as he directs. Where the chief police officer does not so prescribe the time, the police supervisee cannot be said to have failed to act in conformity with the law applicable as the condition precedent (i.e., the prescription of the time by the chief police officer) for the imposition of the duty on the police supervisee would not have been satisfied for the duty to arise.

In the facts of the present case, there was no prescription by the chief police officer of Penang at all for the appellant to report himself to the chief police officer at a prescribed time. Neither was there any prescription by the chief police officer for the appellant to report to the officer in charge of the Butterworth police district on such day and such time in each month as specified. Exhibit P2, which was a record of the appellant's previous convictions maintained by the Criminal Records Office at Kuala Lumpur, cannot by any stretch of the imagination be said to be a police supervision order as contended. It was also not the necessary prescription of the time for the police supervisee to report himself in accordance with s. 296(ii) of the CPC.

There was, in these circumstances, no proof of the commission of the offence charged and the learned Magistrate should have rejected the plea of guilty of the appellant and proceeded to try the case pursuant to s. 173(c) of the CPC as one where the appellant claimed to be tried. In this context, reference may be made to my judgment in Criminal Appeal 41-319-93 in the High Court in Malaya at Penang; *Swander Singh a/l Bawa Singh v. Public Prosecutor* and the cases referred to in that judgment.

However, as the plea of guilty was not rejected and the trial of the appellant thereupon not proceeded with, I am now exercising my powers of revision under chapter XXXI of the CPC and ss. 31 and 35 of the Courts of Judicature Act 1964 to set aside the plea of guilty of the appellant and quash the conviction and sentence imposed on him by the learned Magistrate. I shall not order a retrial as the appellant has been in prison serving sentence from 4 April 1994, and no useful purpose would be served in ordering a retrial as the facts adduced before the learned Magistrate make it clear that the

necessary steps for the enforcing of the direction for police supervision were not taken. The incarceration of the appellant from the date of his arrest until today has therefore not been in accordance with clause (1) of Article 5 of the Federal Constitution which stipulates that no person shall be deprived of his life or personal liberty save in accordance with law.

In the present case, the charge preferred against the appellant was defective as it did not specify the requisitions of s. 296(ii) of the CPC which the appellant did not act in conformity with, no prescription having been made under that section. The conviction of the appellant on the charge was therefore not in accordance with law. That being so, his incarceration cannot be sustained and he is released from custody forthwith.